STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
D.E. Holbrook, P.J., J.J. Cavanagh, P.M. Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No. 120437

CHRISTOPHER LAMAR HAWKINS
Defendant-Appellee

Lower Court No: 99-122537-FH
COA NO. 230839

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

President
JOSEPH K. SHEERAN

Michael E. Duggan
Prosecuting Attorney
County of Wayne

OLGA AGNELLO
Principal Attorney, Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5777

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Statement of the Question

I.

The exclusionary rule is a judicially created sanction for police misconduct that violates the constitution. Whether exclusion of evidence should be imposed as a sanction for a statutory violation is left to the authority of the legislature, and must be found in the statute; further, the purpose of the exclusionary rule is not advanced when there is no misconduct by the police but a misjudgment by a judicial officer. Is exclusion of evidence for a judicial misjudgment, arguably resulting in a warrant in violation of MCL § 780.653, supported by that statute?

Amicus answers: "NO"

Statement of Facts

Amicus joins the statement of facts of the People of the State of Michigan.

Argument

I.

The exclusionary rule is a judicially created sanction for police misconduct that violates the constitution. Whether exclusion of evidence should be imposed as a sanction for a statutory violation is left to the authority of the legislature, and must be found in the statute; further, the purpose of the exclusionary rule is not advanced when there is no misconduct by the police but a misjudgment by a judicial officer. Exclusion of evidence for a judicial misjudgment, arguably resulting in a warrant in violation of MCL §780.653, is not supported by that statute.

A. Introduction: The Rationale of the Court of Appeals Opinion

The Court of Appeals found its task rather simple. It reasoned that:

- In *People v Sherbine*[1] this court suppressed evidence for violation of MCL § 780.653.
- In *People v Sloan*[2] this court suppressed for violation of MCL § 780.653, albeit a different portion of the statute than at issue here, and held that suppression was required under the statute.
- Because *Sloan* stated that "evidence specifically in violation of MCL § 780.653...must be excluded" and did not limit its statement to any particular portion or portions of the statute, any violation of the statute requires exclusion.[3]

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[1] *People v Sherbine*, 421 Mich 502 (1984).

[2] *People v Sloan*, 450 Mich 160 (1995).

[3] See Slip opinion, at fn 3, p. 3.

The opinion of the Court of Appeals, however, fails to take account of fundamental changes in the legal landscape since the decision in *Sloan*, changes that mandate a different result. On the question of exclusion of evidence for statutory violations, *Sherbine* and *Sloan* are no longer viable, but have been supplanted by cases such as *People v Stevens,*[4] cases which recognize, as *Sherbine* and *Sloan* did not, that the question of exclusion of evidence for a statutory violation is answered through inquiry into the requirements of the statute, to see if that sanction has been mandated by the legislature. Further, because exclusion of evidence is a sanction to deter police misconduct that violates the constitution, application of that sanction to errors in judgment by judicial officers, as in this case–as well as in *Sherbine* and *Sloan*–does not serve the purpose of the exclusionary rule, and inflicts gratuitous harm on the public interest.

B. <u>The Changed Legal Landscape</u>

This court in *Sherbine* construed MCL § 780.653 as it was then written, permitting probable cause to be based on "reliable information supplied to the complainant from a credible person, named or unnamed, so long as the affidavit contains affirmative allegations that the person spoke with personal knowledge of the matters contained therein." This language was viewed by the majority as containing a requirement that even sources of information that were named in the affidavit, such as police officers or ordinary citizens, be

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[4] *People v Stevens*, 460 Mich 626 (1999).

shown in some way to be "credible."[5] The court concluded: "The statutory violation here is clear. The statute requires proof that the informant who supplied the information be credible. The affidavit here failed to satisfy this requirement. The evidence must therefore be suppressed."[6] The court's justification for application of a sanction for the violation of the statute–the court taking no notice that the violation was made by the issuing judicial officer and not the police–was that it had previously suppressed evidence when the "police failed to accord the defendant a statutory right and such noncompliance resulted in incriminating evidence" in *People v Dixon*, where exclusion of evidence was ordered for failure to afford the defendant the opportunity to post interim bail before being incarcerated at the station.[7] But 1)*Dixon* itself supplied no authority for imposing an exclusionary sanction, and 2)at least arguably the error there was one by the police, not a judicial officer, though still one not in violation of the constitution, and the court undertook no analysis of its authority to exclude evidence for violation of a statute that itself contained no exclusionary sanction for its violation. In relying on *Dixon* as providing authority for excluding evidence for violation of a statute–especially a violation by a judicial officer–*Sherbine* is built on sand.

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[5] The legislature promptly overturned this odd construction by amending the statute..

[6] 421 Mich at 512.

[7] 421 Mich at 512.

In *Sloan* the court paid some attention, at least, to the question of its authority to suppress for violation of a statute–again not taking into account that it was the issuing magistrate who violated the statute, and not the police–when it found that information given under oath by the affiant to the issuing magistrate but not memorialized formally in the affidavit may not be considered on the question of whether the warrant was supported by probable cause. The majority relied almost exclusively on the doctrine of legislative acquiescence. Because, said the majority, the legislature had acted so as to "overrule" *Sherbine* by amending the statute, and in so doing had not amended the statute to include an "anti-exclusionary rule" provision, the "legislature appears to have acquiesced in this particular construction," revealing that it "shared our view that no remedy other than exclusion is as likely to assure the full enforcement of all of the requirements" of the statute.[8] Amicus would point out that Justice Boyle's rebuttal to this use of the doctrine of legislative acquiescence–now firmly discredited by this court–is persuasive.[9]

(1) Legislative acquiescence discredited

The only real foundation for exclusion of evidence for violation of a statute, where nothing in the statute suggests that the legislature has included such a requirement in the statute–legislative acquiescence as supposed revealed in the amendment of MCL §

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[8] 450 Mich, at 183.

[9] 450 Mich at 202.

780.653–has, since *Sherbine*, been firmly repudiated; indeed, the doctrine was of little worth even at the time *Sherbine* was decided.

The notion that the "failure" of the legislature to amend a statute so as to overturn specifically some judicial pronouncement is an acceptance of that pronouncement by the legislature, akin to the actual enactment of the judicial gloss into statutory law, as though it had passed both Houses of the legislature and been signed by the governor, is a profound misunderstanding of our system of government. As Justice Scalia has said, "This assumption, which frequently haunts our opinions, should be put to rest," for it is, in fact, "a canard"[10] in that it ignores "rudimentary principles of political science to draw any conclusions regarding 'the intent of the legislature' from the *failure* to enact legislation."[11] Indeed, "We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."[12]

The doctrine of legislative acquiescence has also long been suspect in this state. This court attacked it in several opinions as much as four decades ago. In *Halfacre v Paragon*

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[10] See *Johnson v Transportation Agency*, 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442 (1987) (Justice Scalia, dissenting, at 94 L Ed 2d at 656). See also *Patterson v McLean Credit Union*, 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363 (1989): "It does not follow...that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation....Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President....Congressional inaction cannot amend a duly enacted statute." See further *Central Bank v First International Bank*, 511 US 264, 128 L Ed 2d 119, 114 S Ct 1439 (1994).

[11] 94 L Ed 2d at 656.

[12] *Helvering v Hallock*, 309 US 106, 121 84 L Ed 604, 60 S Ct 444 (1944).

Bridge and Steel Co[13] the court called it "this weird doctrine of legislative action by inaction," and said that the court had a "right and duty to re-examine and re-examine again, if need be, statutory enactments already judicially construed," unrestricted by "such stultifying notions of judicial infallibility or, if you wish, impotence, that once having spoken we can speak no more."[14] The court called the doctrine a " pernicious evil designed to relieve a court of its duty of self-correction," which had been "examined and rejected by this court before."[15]

Not only has legislative acquiescence been the subject of attacks by this court before the decision in *Sherbine*, but more recent decisions have firmly laid the doctrine to rest. In *Donajkowski v Alpena Power*[16] this court remarked that "legislative acquiescence is an exceedingly poor indicator of legislative intent." The court made the matter clear:

> If it has not been clear in our previous decisions, we wish to make it clear now: "legislative acquiescence" is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words,* not from its silence.[17]

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[13] *Halfacre v Paragon Bridge and Steel Co.*, 368 Mich 366 (1962).

[14] 368 Mich at 377-379.

[15] And see *Wycko v Gnodtke*, 361 Mich 331, 338 (1960)("a legislature legislates by legislating, not by doing nothing, not by keeping silent").

[16] *Donajkowski v Alpena Power*, 460 Mich 243 (1999).

[17] 460 Mich at 261.

Since *Donajkowski* this court has repeatedly disparaged the doctrine of legislative acquiescence as unsound.[18] Of particular interest is *Nawrocki v Macomb County Road Commission*[19] as it compares to *Sherbine*, for there the dissent argued that "the Legislature [in making revisions to the governmental immunity act in 1999] did not revise the highway exception to exclude traffic control devices, despite [the holding of a prior decision] that traffic control devices are included within the exception." This court rejected that argument, as it should reject *Sherbine* as authority for excluding evidence as a sanction for statutory violations–saying that "this Court has made it clear that the doctrine of legislative acquiescence is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words,* not from its silence."[20]

Sherbine–and *Sloan*, which relied on *Sherbine*–provide no justification for excluding evidence for a statutory violation in the absence of any finding that the legislature intended that sanction, especially where it would be decidedly odd for the legislature to have concluded that excluding the truth in a criminal trial is a sound method for insuring *judicial* compliance with search warrant statutes.

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[18] See e.g *People v Borchard-Ruhland*, 460 Mich 278 (1999); *Robinson v City of Detroit*, 462 Mich 439 (2000); *Hanson v Board of County Road Commissioners*, 465 Mich 492 (2002); *Robinson v DaimlerChrysler Corp*, 465 Mich 732 (2002).

[19] *Nawrocki v Macomb County Road Commission*, 463 Mich 153 (2000).

[20] 463 Mich at 178.

(2) The necessary inquiry into legislative intent

The other significant change in the legal landscape not referenced by the Court of Appeals in this case is this court's determination that excluding evidence for violation of a statute is only to be undertaken when the legislation in question authorizes or commands that result.[21]

People v Stevens demonstrates the point. Not only did this court reject application of the exclusionary rule to a knock-and-announce violation that violates the constitution, finding that if both the warrant and the scope of the search are proper, any evidence found is simply not the fruit of the violation, but the court also rejected application of an exclusionary sanction for violation of the state statute concerning knock-and-announce. The court embraced Justice Boyle's statement in *People v Wood*[22] that "Whether suppression is appropriate is a question of statutory interpretation and thus one of legislative intent." Rejecting exclusion, the court concluded:

> Nothing in MCL § 780.656 alludes to the exclusionary rule being a valid remedy for violation of the statute. Rather, the Legislature enacted MCL § 780.657 to serve as a sanction for someone who exceeds or exercises authority unnecessarily when executing a search warrant.
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> The per se exclusionary rule arose out of and applies to

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[21] On the question of the authority of the judiciary to order the exclusion of evidence as a sanction for the violation of a statute, see Baughman, "The Emperor's Old Clothes: A Prosecutor's Reply to Mr. Leitman Concerning Exclusion of Evidence for Statutory Violations," 1999 DCL L Rev 701.

[22] *People v Wood*, 450 Mich 399, 408 (1995)(Justice Boyle, concurring).

> constitutionally invalid arrests. In *Lopez v. United States*... the United States Supreme Court cautioned that to exclude material evidence "must be sparingly exercised" because it would interfere with the function of a criminal trial, which the Court described as the determination of the truth or falsity of the charges. The Legislature has not chosen to specifically mandate the sanction of excluding evidence seized as a result of the violation of MCL § 780.656. Nothing in the wording of the statute would suggest that it was the legislators' intent that the exclusionary rule be applied to violations of the "knock and announce" statute. Therefore, we decline to infer such a legislative intent. To do otherwise would be an exercise of WILL rather than JUDGMENT.[23]

This court took the same approach very recently in *People v Hamilton*.[24] There the arrest comported with the constitution because made on probable cause, but the officer acted in violation of statute because the arrest was made outside of his "bailiwick" and not in pursuit of the offender from his jurisdiction, nor in conjunction with local authorities. This court rejected exclusion of evidence as a sanction for this statutory violation: "The question in such cases is whether the Legislature intended to apply the drastic remedy of exclusion of evidence....we find no indication in the language of MCL § 764.2a that the Legislature intended to impose the drastic sanction of suppression of evidence when an officer acts outside the officer's jurisdiction. Rather, we believe that the language supports the analysis of several Court of Appeals decisions that the statute was intended, not to create a new right

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[23] 460 Mich at 644-645 (footnote and internal citations omitted). See also *People v Sobczak-Obetts*, 463 Mich 687 (2001) (no exclusion for failing to leave affidavit or basis of probable cause for warrant with defendant at time of its execution, as required by MCL § 780.654; MCL § 780.655).

[24] *People v Hamilton* 465 Mich 526 (2002).

of criminal defendants to exclusion of evidence, but rather to 'protect the rights and autonomy of local governments' in the area of law enforcement."[25]

These changes in the legal landscape, then, demonstrate that neither *Sherbine* nor *Sloan* can be relied on to support the holding of the Court of Appeals that evidence gained from execution of a warrant issued in violation of the requirement of MCL § 780.653 that information from an unnamed informant must be supported by affirmative allegations supporting his or her credibility is to be suppressed. The question is one of legislative intent, an analysis that the Court of Appeals failed to undertake, despite this court's decisions in such cases as *Stevens*.

C. No Legislative Intent to Exclude Evidence For Violation of the Statute Can be Found

In determining the intent of the legislature, it is important to examine the statute not in isolation, but in the context of the entire statutory scheme–and that scheme is directed to the authority of judicial officers to issue search warrants. MCL § 780.651(1) provides:

> When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated.

MCL § 780.653, following on this provision, provides:

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[25] 465 Mich at 534-535.

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Where a search warrant is issued by a judicial officer though the affidavit contains information from an unnamed person that is unsupported by any affirmative allegation that the person is credible or the information reliable, the judicial officer has erred. The police officer–who is not a legal technician–has done that which the law prefers, for he or she has brought the information to a neutral and detached judicial officer for that officer to determine whether the law permits the issuance of a search warrant. And the statutory scheme contains a sanction should that magistrate be mislead, and maliciously so, in the determination of probable cause, for MCL § 780.658 provides that "Any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000.00 or imprisoned not more than 1 year." But no sanction is provided should the magistrate err in the issuance of the warrant by misjudging the sufficiency of the information to show probable cause, or by failing to note the absence of affirmative allegations of credibility of an unnamed informant (or of the reliability of the information as an alternative). Certainly, excluding the truth from the trial as a sanction for

the judicial error makes no sense, and such a result cannot be ascribed to the legislature where the statutory scheme provides *no* textual support for it of any kind,[26] especially where the statutory scheme contains sanctions both for maliciously obtaining a warrant, and for unnecessary force in entry in the execution of the warrant. The legislature knows how to include a sanction when it so desires, and the sanction of exclusion for the judicial error here is not contained in the statute in any fashion.

D. Conclusion

Under this court's more recent jurisprudence on the manner in which the question of exclusion of evidence for a statutory violation is to be approached, exclusion for violation of MCL § 780.653 is inappropriate, for no legislative intent to sanction the issuing magistrate by excluding probative evidence from the trial can be found in the statute.

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[26] Amicus would note that this argument supports adoption of the so-called "good-faith" exception to the sanction of exclusion where a search warrant is employed and constitutional error has occurred because of a judicial misjudgment as to probable cause, an issue not presented in this case because not the basis of the decision of the trial court or the Court of Appeals. That issue is presented in the pending case of *People v Scherf*, 251 Mich App 410 (2002)(leave granted 649 NW2d 82 (2002)), so that if in this case it is ultimately determined that the warrant affidavit also fails to show probable cause in the "constitutional sense," *Scherf* will control whether exclusion applies to that judicial error.

Relief

Wherefore, amicus requests that the Court of Appeals be reversed..

Respectfully submitted,

JOSEPH K. SHEERAN
President
Prosecuting Attorneys Association
of Michigan

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

OLGA AGNELLO
Principal Attorney, Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5777